No. 86-863

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

KENNETH KIZER, DIRECTOR OF CALIFORNIA DEPARTMENT OF HEALTH SERVICES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE PETITIONER SUGGESTING MOOTNESS

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-863

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

KENNETH KIZER, DIRECTOR OF CALIFORNIA DEPARTMENT OF HEALTH SERVICES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE PETITIONER SUGGESTING MOOTNESS

The Solicitor General, on behalf of the Secretary of Health and Human Services, respectfully suggests that this case is presently moot because of the enactment of Section 4106 of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203 (Dec. 22, 1987), and action taken by the Secretary of Health and Human Services pursuant to Section 4106.[1]

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[1] We have reproduced Section 4106 of the Omnibus Budget Reconciliation Act of 1987 as Appendix A to this memorandum (App., *infra*, 1a). The Act is not yet available as a printed public law, paginated as it will appear in the Statutes at Large. We therefore have reproduced Section 4106 as it appears in the House Conference Report on the bill (H.R. Conf. Rep. 100-495, 100th Cong., 1st Sess. (1987)), which is printed in the Congressional Record. See 133 Cong. Rec. H12103, H12146 (daily ed. Dec. 21, 1987). We previously informed the Court of the enactment of Section 4106 by letter to the Clerk dated December 30, 1987, and we appended to that letter copies of the pertinent pages of the House Report (H.R. Rep. 100-391, 100th

1. This case presents the question whether a proposed amendment to California's Medicaid plan is consistent with Section 1903(f)(1)(B)(i) of the Social Security Act, 42 U.S.C. 1396b(f)(1)(B)(i). Section 1903(f)(1)(B)(i) sets the maximum income level for federal financial participation purposes under the "medically needy" Medicaid program at 133⅓% of the highest amount that would ordinarily be paid to a family of the "same size" under the Aid to Families with Dependent Children (AFDC) program in the State. The proposed amendment at issue in this case—California State Plan Amendment (SPA) 83-14—sets the medically needy income level for a family consisting of two adults at 133⅓% of the amount paid to a family of three under California's AFDC program.

Respondent Kizer's predecessor as Director of the California Department of Health Services formally submitted SPA 83-14 to the Health Care Financing Administration (HCFA) in the Department of Health and Human Services in September 1983 (J.A. 22-24). In a final decision rendered on January 30, 1985, the Administrator of HCFA disapproved the proposed amendment on the ground that it sought federal financial participation for one category of California families—adult couples—at levels of income that exceeded the cap imposed by Section 1903(f)(1)(B)(i) (Pet. App. 38a-45a). On petition for review, the court of appeals reversed the Administrator's decision disapproving SPA 83-14 (*id.* at 1a-19a). This Court then granted the Secretary's petition for a writ of certiorari to review the judgment of the court of appeals, and the case was argued on November 10, 1987.

Thereafter, on December 22, 1987, the President signed into law the Omnibus Budget Reconciliation Act of 1987. Section 4106 of that Act provides that "[f]or purposes of

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Cong., 1st Sess. Pt. 1, at 484-485 (1987)) and the House Conference Report, as reproduced at 133 Cong. Rec. H12103, H12146, H12310 (daily ed. Dec. 21, 1987).

section 1903(f)(1)(B) of the Social Security Act, for payments made to California on or after July 1, 1983," the income level for a family consisting of two adults shall, at California's option, be the amount of AFDC payments that would ordinarily be made to a family consisting of an adult and two children. HCFA has concluded that the special provisions of Section 4106 of the Omnibus Budget Reconciliation Act of 1987, which apply only to adult couples in California, require that SPA 83-14 be approved, effective July 1, 1983, without regard to whether such approval was permitted by the general provisions of Section 1903(f)(1)(B)(i) of the Social Security Act, as the Ninth Circuit held in this case. Accordingly, by letter dated February 10, 1988, the Associate Regional Administrator of HCFA notified the Deputy Director of the California Department of Health Services that SPA 83-14 has been approved on the basis of Section 4106 of the 1987 Act, with an effective date of July 1, 1983. App. B, *infra*, 2a-4a.[2]

2. This case is presently moot as a result of the enactment of Section 4106 of the Omnibus Budget Reconciliation Act of 1987 and the February 10, 1988, letter from the Associate Regional Administrator of HCFA that approves SPA 83-14 pursuant to Section 4106, with an effective date of July 1, 1983. In light of HCFA's February 10, 1988, decision, which renders SPA 83-14 valid for the entire period

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[2] The Associate Regional Administrator of HCFA previously had informed the California Department of Health Services, by letter dated December 9, 1986, that SPA 83-14 was approved with an effective date of July 1, 1983. See App. C, *infra*, 5a-6a. But that letter made clear that HCFA's approval was given only conditionally, pursuant to the court of appeals' mandate (which had not been stayed), and that if this Court were to reverse the Ninth Circuit's judgment, HCFA's approval of SPA 83-14 would be void ab initio (*ibid.*). HCFA's February 10, 1988, letter approving SPA 83-14 expressly supersedes the conditional approval given by the December 9, 1986, letter. See App. B, *infra*, 3a.

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for which California has sought to have it approved, there is at this time no case or controversy in this Court regarding the correctness of HCFA's January 30, 1985, decision disapproving SPA 83-14 under Section 1903(f)(1)(B)(i) of the Social Security Act. The Court's "established practice" when a case that is pending before the Court for decision becomes moot is to vacate the judgment below and to remand with directions to dismiss the case as moot. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). See, *e.g.*, *Deakins* v. *Monaghan*, No. 86-890 (Jan. 12, 1988), slip op. 5-8, 11; *Burke* v. *Barnes*, No. 85-781 (Jan. 14, 1987); *United States Department of State* v. *Washington Post Co.*, 464 U.S. 979 (1983).[3] The

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[3] The validity of SPA 83-14 has been the only underlying issue in this case from the outset: respondent Kizer's predecessor sought judicial review in the Ninth Circuit of HCFA's January 30, 1985, decision disapproving SPA 83-14, and the opinion and judgment of the court of appeals simply reversed the Secretary's decision disapproving SPA 83-14 (Pet. App. 19a, 21a). The court of appeals of course addressed several legal issues bearing on the validity of SPA 83-14 that went beyond the question whether SPA 83-14 was consistent with Section 1903(f)(1)(B)(i) of the Social Security Act—*e.g.*, whether a provision in an unpublished and since-rescinded 1979 regional office manual that lent support to California's position was a binding "legislative rule" for purposes of the Administrative Procedure Act (APA), and whether the "moratorium" provisions of Section 2373(c) of the Deficit Reduction Act of 1984 (DEFRA), Pub. L. No. 98-369, 98 Stat. 1112, barred the Secretary from disapproving SPA 83-14. However, the courts' rulings on those legal issues were simply *reasons* it advanced for why the Secretary's January 30, 1985, decision disapproving SPA 83-14 was erroneous; the correctness of that decision has at all times been the single underlying legal issue before the court of appeals and this Court.

Although HCFA has approved SPA 83-14, it nevertheless is important that the judgment of the court of appeals be vacated. That course would eliminate any precedential effect in other contexts of the court of appeals' ruling on the APA and "DEFRA moratorium" issues, as well as the precedential effect for States other than California of the court of appeals' holding that Section 1903(f)(1)(B)(i), standing alone,

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intervenor-respondents in this case (Barrier, Bierman and Kwiek) agree that this case is now moot, and they accordingly filed a Motion to Dismiss as Moot on January 12, 1988.[4]

Although this case is presently moot by virtue of the enactment of Section 4106 of the Omnibus Reconciliation Act of 1987, we have been informed by the Director of the Office of Management and Budget, by letter dated February 2, 1988, that the President intends to urge Congress to repeal Section 4106 as part of a larger package of proposed amendments to the 1987 Act. App. D, *infra*, 7a. The Director states that this legislative proposal "will be transmitted to Congress in the very near future for its prompt consideration" (*ibid.*). If Congress were to act promptly to repeal Section 4106, then this case would be restored to the same posture it was in when it was briefed and argued, as if there had been no intervening legislation. However, there can of course be no assurance that Congress will take any such action in the near future, and under the law as it currently stands, the case is moot. We shall inform the Court of the formal submission to Congress of the President's proposal to repeal Section 4106 and of any action taken by Congress on that proposal.[5]

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permits a family consisting of *two* persons to be regarded as the "same size" as an AFDC family consisting of *three* persons.

[4] The intervenor-respondents do not expressly state in their Motion to Dismiss as Moot that the judgment of the court of appeals should be vacated. However, in the decisions of this Court that the intervenor-respondents cite (at 3) for the proposition that this case should be dismissed, the Court vacated the judgment of the lower court. See *Hall* v. *Beale*, 396 U.S. 45, 49-50 (1969); *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 414-415 (1972).

[5] The February 10, 1988, letter from the Associate Regional Administrator of HCFA informs the Deputy Director of the California Department of Health Services that if Congress does repeal Section 4106 of the 1987 Act, HCFA's approval of SB 83-14 pursuant to Section 4106 would be void ab initio (App. D, *infra*, 4a).

CONCLUSION

If Section 4106 of the Omnibus Budget Reconciliation Act of 1987 is not repealed before the Court chooses to dispose of this case, the judgment of the court of appeals should be vacated and the case should be remanded to the court of appeals with directions to dismiss as moot the petition for review of the January 30, 1985, decision of the Administrator of the Health Care Financing Administration.

Respectfully submitted.

CHARLES FRIED
Solicitor General

FEBRUARY 1988

APPENDIX A

Section 4106 of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203 (Dec. 22, 1987), provides:

Medically Needy Income Levels For Certain 2-Member Couples in California.

For purposes of section 1903(f)(1)(B) of the Social Security Act, for payments made to California on or after July 1, 1983, in the case of a family consisting only of two individuals both of whom are adults and at least one of whom is aged, blind, or disabled, the "highest amount which would ordinarily be paid to a family of the same size" under the State's plan approved under part A of title IV of such Act shall, at California's option, be the amount determined by the State agency to be the amount of the aid which would ordinarily be payable under such plan to a family which consists of one adult and two children and which is without any income or resources. Section 1902(a)(10)(C)(i)(III) of the Social Security Act shall not prevent California from establishing (under the previous sentence) an applicable income limitation for families described in that sentence which is greater than the income limitation applicable to other families, if California has an applicable income limitation under section 1903(f) of such Act which is equal to the maximum applicable income limitation permitted consistent with paragraph (1)(B) of such section for families other than those described in the previous sentence.

APPENDIX B

Health Care
Financing Administration

DEPARTMENT OF HEALTH & HUMAN SERVICES

Region IX
100 Van Ness Avenue
San Francisco CA 94102

John Rodriguez, Deputy Director
Medical Care Services
Department of Health Services
714 P Street
Sacramento, California 95814

FEB 10, 1988

Dear Mr. Rodriguez:

On December 9, 1986 we advised you by letter that pursuant to the Court of Appeals' mandate in *Cubanski* v. *Heckler*, California State Plan Amendment No. 83-14 was approved with an effective date of July 1, 1983. However, we also noted that in the event the Department petitioned the United States Supreme Court for a writ of certiorari and the decision of the Court of Appeals were reversed by the Supreme Court we would view our approval of the amendment to be *void ab initio*. As you are aware, the United States sought Supreme Court review of the *Cubanski* decision and the Court agreed to hear the case, *sub nom. Bowen* v. *Kizer*, No. 86-863 argued November 10, 1987.

On December 22, 1987 the President signed into law the Omnibus Budget Reconciliation Act of 1987 (OBRA '87), Pub. L. No. 100-203. Section 4106 of that enactment provides that

> For purposes of section 1903(f)(1)(B) of the Social Security Act, for payments made to California on or

after July 1, 1983, in the case of a family consisting only of two individuals both of whom are adults and at least one of whom is aged, blind, or disabled, the "highest amount which would ordinarily be paid to a family of the same size" under the State's plan approved under part A of title IV of such Act shall, at California's option, be the amount determined by the State agency to be the amount of the aid which would ordinarily be payable under such plan to a family which consists of one adult and two children and which is without any income or resources. Section 1902(a)(10)(C)(i)(III) of the Social Security Act shall not prevent California from establishing (under the previous sentence) an applicable income limitation for families described in that sentence which is greater than the income limitation applicable to other families, if California has an applicable income limitation under section 1903(f) of such Act which is equal to the maximum applicable income limitation permitted consistent with paragraph (1)(B) of such section for families other than those described in the previous sentence.

Since under § 4106 of OBRA '87 California's amendment 83-14 clearly comports with the income limitation specified in § 1903(f) of the Act, the basis for our original disapproval of that amendment is no longer relevant. Therefore, we are now approving the amendment, with an effective date of July 1, 1983, on the basis of § 4106. This letter replaces our letter of December 9, 1986.

The enactment of § 4106 of OBRA '87 also removes the basis for our disapproval of California State Plan Amendments Nos. 84-20, 85-11, and 86-7 with respect to which you have sought reconsideration of the disapproval.

Accordingly, we are approving amendments 84-20, 85-11, and 86-7 with effective dates of July 1, 1984, July 1, 1985, and July 1, 1986 respectively.

We do wish to inform you, however, that we have been informed by the Director of the Office of Management and Budget that the President intends to urge Congress to repeal § 4106 of OBRA '87 as part of a larger package of proposed amendments to that Act. Since the approval of the four amendments at issue here is based solely on § 4106 of the 1987 Act, this approval will be void *ab initio* if Congress repeals § 4106.

Sincerely,

/s/ John L. O'Hara, Jr.

JOHN L. O'HARA, JR.
Associate Regional Administrator
Division of Program Operations

cc: Joe Stein, Esq.

APPENDIX C

Health Care Financing Administration

DEPARTMENT OF HEALTH & HUMAN SERVICES

Region IX
100 Van Ness Avenue
San Francisco CA 94102

John Rodriguez, Deputy Director
Medical Care Services
Department of Health Services
714 P Street
Sacramento, California 95814

DEC 9 1986

Dear Mr. Rodriguez:

We are in receipt of the attached mandate to implement from the U.S. Ninth Circuit Court of Appeals regarding the *Cubanski v. Heckler* decision of July 23, 1986. This letter is to advise you that, pursuant to the Court of Appeals' mandate, California State Plan Amendment #83-14 is approved with an effective date of July 1, 1983.

Please be advised, however, that this approval is made solely under the authority of the Court's order. In the event that the Department petitions the United States Supreme Court for a writ of certiorari in *Cubanski v. Heckler* and should the decision of the Court of Appeals ultimately be reversed by the Supereme Court, it is our view that the approval of SPA #83-14 would be *void ab initio*.

We shall keep you apprised of our decision regarding whether to petition the Supreme Court for a writ of cer-

tiorari. If you have questions, please call Bruce Campbell, California State Representative at (415) 556-4060.

Sincerely,

/s/ John L. O'Hara, Jr.

JOHN L. O'HARA, JR.
Associate Regional Administrator
Division of Program Operations

Attachments

cc: Frank Martucci, Chief
Medi-Cal Eligibility Policy
Cade Morrow, OGC, Region IX

APPENDIX D

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

FEB 2, 1988

Honorable Charles Fried
Solicitor General
Department of Justice
Washington, D.C. 20530

Dear Mr. Fried:

I understand that section 4106 of the Omnibus Reconciliation Act of 1987, Public Law 100-203, has some bearing on a case entitled *Bowen v. Kizer*, No. 86-863, currently pending before the Supreme Court.

This letter is to advise you that the President intends to urge the Congress to repeal this provision as part of a larger package of objectionable provisions contained in that Act. It is anticipated that this legislative proposal will be transmitted to Congress in the very near future for its prompt consideration.

You may wish to advise the Supreme Court of this in its consideration of a motion to dismiss as moot.

Sincerely yours,

/s/ James C. Miller, III

JAMES C. MILLER, III
Director

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